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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1924.

No. 680.

MARIANO VIAMONTE FERNANDEZ,
Appellant,

v.

PERLEY B. PHILLIPS, Marshal of the United States for the District of New Hampshire,
Appellee.

BRIEF OF APPELLEE.

JEROME S. HESS,
HAROLD B. ELGAR,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM—1924.

No. 680.

MARIANO VIAMONTE FERNANDEZ,
Appellant,

v.

PERLEY B. PHILLIPS, Marshal of the United States for the District of New Hampshire,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

Statement.

This is an appeal (fol. 194) from a judgment dismissing a petition for *habeas corpus* and remanding appellant to the custody of the United States Marshal for the District of New Hampshire for deportation. The appeal was allowed (fol. 177) on June 26, 1924.

The proceeding is in extradition, instituted upon the complaint of the Assistant United States Attorney for the District of New Hamp-

shire, (fol. 12) under the authority and in behalf of the Government of the United States of Mexico and as agent for said Government, (fol. 13), asking for the arrest of the appellant upon the allegation that the appellant had within the City of Mexico, in the United States of Mexico, committed the crime of embezzlement or peculation of the public funds of the United States of Mexico, between May, 1922 and February 1, 1923, while then and there a public officer of the United States of Mexico, to wit, the Cashier of the Department of Special Taxes (fol. 12). The action of the United States Attorney was taken by direction of the State Department at the request of the Government of the United States of Mexico.

On said complaint a warrant was issued (fol. 13) and the matter duly came on for hearing on April 10, 1924, before Hon. James A. Lowell, United States District Judge for the First Circuit designated to hold the December 1923 Term of the District Court of the United States for the District of New Hampshire (fol. 14). After motions to quash the complaint and to dismiss the proceeding had been denied, testimony was taken and a long hearing held before Judge Lowell (fols. 18 to 169). At the end of the hearing a motion was made for discharge upon eight grounds (fol. 170), which motion was denied (fols. 19 and 20), and thereupon the appellant was committed to the custody of the Marshal. Thereafter on April 22, 1924, the appellant filed a petition for writs of *habeas corpus* and certiorari (fols. 1 to 5) which were duly issued (fol. 6). Judge Morris, United States District Judge for

the District of New Hampshire, after hearing arguments on the matter and considering the briefs which were filed by each side, filed a rescript (fols. 171 and 172) holding that he had no jurisdiction to override the decision of Judge Lowell. Subsequently the case of *Collins* v. *Miller*, 252 U. S. 364, having been called to the attention of Judge Morris, he filed a further rescript on June 7, 1924 (fol. 173) determining the matter upon its merits and holding that he was of the opinion that there was sufficient evidence adduced before Judge Lowell to warrant holding the relator in custody to await action on extradition, and denying the writ on its merits.

Thus the appeal stands as an appeal from a judgment denying the relief sought by a writ of *habeas corpus* in a case where two United States District Court Judges have decided on the merits that probable cause for the extradition of the appellant exists.

Facts.

The facts appearing in the record amply demonstrate the correctness of such ruling of the two United States District Court Judges before whom the matter has been very fully presented and argued.

The appellant is charged by the Government of the United States of Mexico with having, while Cashier of the Department of Special Taxes of said Government, committed the crime of peculation or embezzlement of public funds received by him in his capacity as such Cashier. Embezzlement, or "peculation" as the crime is called in Mexico, is a crime equally recognized by both Governments and a crime which is recognized by

the statutes of the State of New Hampshire, within which State the appellant resided at the time of his arrest in this proceeding.

Article 1026 of the Penal Code of Mexico (fol. 39) provides,—"The crime of peculation is committed by every person who being in charge of a public service, though it be on a commission for a limited time, and not having an official character, that for private uses, for himself or for others, fraudenly detracts from its object, the money, values, properties or any other thing pertaining to the Nation, to a Municipality, or to an individual, if by reason of his charge he should have received them to administer them, as a deposit, or for any other cause." The court will readily see that this description of the crime of peculation, as set forth in the Mexican Code, is in all respects in accord with the crime of embezzlement as such crime is generally defined by the statutes of the various States of the United States and by the United States. There exists, therefore, that substantial similarity of the crime in the two countries, which is necessary as a basis for an application for extradition.

The appellant was employed as Cashier of the Department of Special Taxes, which is a Department of the Secretaria de Hacienda y Credito Publico of the United States of Mexico, between the dates of April 8, 1920 and February 1, 1923 (fol. 168). His duties as such Cashier were to receive monies paid in as taxes and to account therefor accordingly upon the making of such collections (fol. 168). At no time during the incumbency of his office as Cashier did he have any authority whatsoever to take or send any

money from his office, except for delivery to the General Treasurer of the United States of Mexico (fol. 169). About January 20, 1923, the appellant applied to his chief, E. Robles, whose deposition appears at folios 168 and 169 of the record, for a vacation, and at the end of January he turned over his office to the Assistant Cashier, Mr. Evaristo Aznar, whose testimony appears at folios 47 to 49 of the record. At the time of said transfer the appellant did not deliver to his successor certain official documents which he promised to turn over the next day, but which he never did turn over for the reason that he never thereafter returned to the office (fol. 48). This circumstance caused said Aznar to make certain investigations of the cashier's books which appellant had kept in his own handwriting, in the course of which he noticed various irregularities, of which he immediately advised the Treasury Department (fol. 49). In addition, the actions and habits of the appellant after business hours had caused his chief, Robles, to become suspicious (fol. 168). As a result of these suspicions and irregularities, one Jesus Icaza, an inspector of the Treasury Department, was appointed to make an inspection, and after eigheen days of careful inspection found that the appellant had been guilty of the embezzlement of 137,387.61 pesos oro nacional (fol. 50 and fols. 69 to 154).

In order to understand the results arrived at by the expert accountant's examination of the books in the office of the Cashier of the Department of Special Taxes, which books, it is very important to notice, were kept by the appellant

in his own handwriting (fol. 48 and fols. 159 to 164), it is necessary to make a rather extensive statement as to the conduct of business in the Department of Special Taxes and in the Treasury Department of the Mexican Government.

As Cashier in the Department of Special Taxes the appellant handled all cash which was paid into said Department and also handled all the stamps that were kept in said Department for the purpose of being affixed to the tax manifestations when the taxes were paid. All the taxes with which the Department of Special Taxes is concerned are stamp taxes. That is, the payment of the tax is evidenced by the placing of a stamp or stamps on the manifestation and cancelling the same. It, therefore, was the duty of the appellant to receive and account for all cash that was paid into the office of the Cashier, and he also kept the books of account of the Cashier's office, showing the items of ingress and egress, in his own handwriting. The peculations occurred between May 1922 and January 31, 1923, and there were some peculations every month during this period with the exception of the month of July 1922.

The taxes with which the Department of Special Taxes deal are of two kinds, or rather are handled in two different manners by that Department, one method being used in regard to the petroleum taxes and a different method being used in regard to all other taxes.

We will examine first the method used in regard to taxes other than petroleum taxes. In the case of all special taxes (including the petroleum taxes) the manifestations or declarations are

filed each month by the taxpayer in the Department of Special Taxes. These manifestations, except those in regard to petroleum, are kept in the office of the Department of Special Taxes and checked over. When the taxpayer comes in to pay his tax, he receives back his manifestation with the proper stamps affixed thereto and cancelled. This was done by the Cashier, that is, by the appellant. He kept the stamps in his possession which he received from the Stamp Department of the Mexican Treasury and was supposed to enter all those stamps as a debit item on the ingress side of his ledger. When a tax was paid the amount of stamps affixed to the manifestation was supposed to be entered as a credit item on the egress side of the ledger and the amount of money received would be a cross debit entry on the ingress side of the ledger. All of the appellant's peculations consisted of abstractions of certain of the cash which was turned into his window in payment of the general special taxes, but the peculations were concealed by entries made covering the transactions in the petroleum taxes.

In regard to the collection of the petroleum taxes the precedure was substantially different. No cash was received by the Cashier and all the entries in regard to petroleum taxes were merely "virtual" entries. The petroleum manifestations were sent by the Department of Special Taxes to the General Treasurer. The taxpayer went to the office of the General Treasurer of the Nation to make his payment and not to the Department of Special Taxes. Curiously enough the General Treasurer at that time kept no books,

except a daily diary of amounts of money received. The Treasurer gave the taxpayer a receipt in which it is stated that full payment has been made and that the Cash Department of the Department of Special Taxes will deliver the stamps to cover the tax. The Treasurer then sends the manifestation back to the Cashier of the Department of Special Taxes. This Treasurer's receipt is presented by the taxpayer to the Cashier of the Department of Special Taxes where it is taken up to be filed with the original account which is sent to the Department of the Comptroller (fol. 69). The Cashier gives the taxpayer in exchange a provisional receipt which is full evidence that the taxpayer has paid the tax (fol. 70). It is then the duty of the Cashier to send the manifestation to the Stamp Department for the purpose of having the stamps affixed, because on petroleum taxes, unlike the other taxes, the Cashier does not himself affix the stamps. The taxpayer can later on bring back his provisional receipt and secure his stamped manifestation, but naturally some time elapses (fol. 70). The receipts, when sent to the Comptroller, are entered by the Cashier on the credit or egress side of his ledger as monies turned over to the Treasury, and the stamps for the manifestations, when the manifestations are sent to the Stamp Department with the voucher, should be entered on the debit or ingress side of the ledger. Thus, if the Cashier sent all the receipts to the comptroller and all the manifestations to the Stamp Department, and made the proper entries, these items would balance each other.

The appellant did not keep a separate ledger for cash transactions and another ledger for virtual transactions, but entered all the items indiscriminately in one ledger. He credited himself with the amount of the receipts turned in but charged himself with a less amount of manifestations or stamps, the difference being the amount which he had abstracted in cash from the office safe. He suppressed the withheld manifestations in his possession so that there was no record anywhere upon which he could be checked up. It was only by a complete audit of the books, separating what actually entered his hands in cash and was recorded as such and what consisted of virtual entries, that the amount of the peculations and the manner of concealing them could be ascertained (fol. 70). When such a complete audit was made, it showed a shortage of 137,387.61 pesos, oro nacional. It also showed various virtual entries on the egress side of the ledger which had no corresponding entry on the ingress side of the ledger, and these variances were balanced by variances in the cash entries of the same amounts. There are in addition certain corroboratory facts, such as those shown in the testimony of Mr. Aznar at folios 47 to 49 in regard to appellant's actions at the time the office was turned over, and also appellant's extravagant manner of living, as shown by the testimony of Mr. Robles (fol. 168); and also by the testimony of a number of witnesses at folios 159 to 162. In addition, when Icaza made his examination of the affairs of the office he found receipts in full in favor of various petroleum companies in the amount of over half a million pesos,

which had been retained by the Cashier in order to continue his operations (fol. 72).

All of the above facts are clearly supported by the documents in the record to which we will refer more at length and more specifically later in the brief.

POINT I.

Upon an appeal from a judgment denying a writ of habeas corpus the only questions before the Appellate Court are did the commissioner have jurisdiction of the appellant, is the crime charged within the scope of the extradition treaty in question, and was there any evidence of criminality?

An appeal such as this, from a judgment denying discharge upon a writ of habeas corpus, the questions before the Appellate Court, are extremely narrow. It is well settled that a writ of habeas corpus does not operate as a writ of error and that the decision of the judge below will not be reversed and the relator discharged merely because of errors in the admission or rejection of testimony upon the extradition hearing, provided there is any evidence to establish the probability that the relator is guilty of the crime as charged. In other words, upon an appeal such as this, which comes up on habeas corpus, the judgment will be affirmed in all cases where the evidence would have been sufficient to justify a committing magistrate in holding the appellant.

(1909) *Elias* v. *Ramirez*, 215 U. S. 398; 54 L. ed. 253. Appellee was arrested as a fugitive from justice pursuant to the provisions of the extradition treaty with Mexico. The charge was forgery. The appeal was from an order in *habeas corpus* proceedings discharging him from custody. The discharge was upon the ground of lack of sufficient evidence.

The charge was that Ramirez forged certain railroad wheat certificates. *McKenna, J.*

> "The writ of habeas corpus could not be made to perform the office of a writ of error, and that, therefore, if the district judge had jurisdiction of the subject matter and of the accused, and the offense charged was within the terms of the treaty of extradition, and there was before him 'competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purpose of extradition, such decision cannot be reviewed on habeas corpus. * * * Such court is not to inquire whether the legal evidence of facts before the commission was sufficient or insufficient to warrant his conclusion."

(1896) *Ex parte Bryant*, 167 U. S. 104; 42 L. ed. 94. Mr. Justice Brown.

Appeal from an order dismissing writs of habeas corpus and certiorari. Extradition proceeding upon requisition by Great Britain charging the crimes of forgery, larceny, embezzlement and false entries.

> "The question before us is * * * whether there was any *legal evidence* at all upon which the commissioner could decide that there was evidence *sufficient* to justify his

commitment for extradition. (Italics the court.)

"We think there was legal evidence against the prisoner upon which the commissioner was authorized to act, and that is sufficient for the purpose of this case."

(1895) *Ornelas* v. *Ruiz,* 161 U. S. 502; 40 L. ed. 787. *Mr. Ch. J., Fuller.*

Appeal from an order in habeas corpus discharging appellee. Application by Consul of Mexico charging crimes of murder, arson, robbery and kidnapping.

"By repeated decisions of this court it is settled that a writ of habeas corpus cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate had jurisdiction of the subject matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus."

"We are of opinion that it cannot be held that there was substantially no evidence calling for the judgment of the commissioner as to whether he would or would not certify and commit under the statute, and that therefore, as a matter of law, he had no jurisdiction over the subject matter: and this being so, his action was not open to review on habeas corpus."

A writ of habeas corpus does not authorize a re-examination of the facts, nor does it authorize

either the court hearing the writ of habeas corpus, or the appellate court, substituting their judgment and discretion for that of the commissioner. The weight of the evidence, the inferences to be drawn from it, and the existence of probable cause are all matters which are solely within the province of the commissioner and are not called in question upon an appeal such as this.

(1900). *Rice* v. *Ames,* 180 U. S. 371; 45 L. ed. 577.

Mr. Justice Brown held that

> "The finding of the district judge upon the facts * * * is not examinable upon a writ of *habeas corpus.*"

(1912) *Ex Parte Schorer,* 197 F. 67 (E. D. Wis.)

Geiger D. J.

> "It must be borne in mind that the accused was not on trial before the commissioner for the crimes charged. The only question to be determined by the commissioner was that of probable cause * * * and it must likewise be borne in mind that upon habeas corpus the question is narrowed down to determining whether there is any legal evidence upon which the extradition commissioner could exercise his judgment or discretion."
>
> "It is sufficient that the evidence is competent and justifies the inferences. * * * It is always possible to conceive that the accused might be an innocent victim of circumstances; but, if an extradition commissioner has drawn the permissible inferences of guilt, it is beyond the province of the court on *habeas corpus* to reject them."

POINT II.

The extradition proceedings were in all respects regular and complied with all the requirements both of the Treaty with Mexico and of the United States Statutes.

A. The appellant alleges as ground of reversal that the complaint and warrant upon which the appellant was arrested are fatally defective because (1) the complaint does not allege that the appellant had committed any extraditable offense or crime; (2) the alleged offense is not fully and plainly, substantially and formally described in the complaint; and (3) the complaint is based solely upon information and belief.

(1) The complaint (fol. 12) is made by the Assistant United States Attorney and alleges that "he is informed, through diplomatic channel, that one Mariano Fiamonte Fernandez alias Mariano Viamonte Vernandez, is duly and legally charged by the United States of Mexico with having, in the City of Mexico within the United States of Mexico, committed the crime of embezzlement or peculation of the public funds of the United States of Mexico between May, 1922, and February 1, 1923, while then and there a public officer of the United States of Mexico, to wit, the Cashier of the Department of Special Taxes." The complaint then goes on to allege that said crime of embezzlement or peculation is among the crimes enumerated in the Extradition Treaty between the United States and Mexico; that he informs and believes, through diplomatic channel, that a requisition has been made for the

appellant; that the appellant has fled outside of the boundaries and jurisdiction of Mexico and is a fugitive from justice, and the complaint then prays for a warrant.

The appellant argues that the complaint does not charge the respondent with having committed any crime at all, but only alleges that he was charged with the commission of a crime.

In *Ex Parte Zentner*, 188 Fed. 344, D. C. Mass. 1910, there was filed before the commissioner a complaint sworn to by the German Consul at Boston, "wherein was set forth charges against Henrich Zentner, the present petitioner." The court held that this was an allegation of the committing of criminal offenses. In *Benson* v. *McMahon*, 127 U. S. 458, 32 L. ed. 324, the complaint again simply alleged that the appellant was charged with having committed certain crimes, in this case forgery.

In *Re Herskovitz*, 136 Fed. 713, D. C. N. D. Ohio, W. D. 1901—a case cited by the appellant in support of his contention that the complaint is incorrect, the Court said, "Commitment is the direct result of the examination, not of the complaint." This case also holds that the complaint need only be sufficient in its terms as to apprise the person arrested of the offense in respect to which he is charged.

We submit also that the allegation that the appellant is "duly and legally charged" necessarily infers that a proceeding has been instituted in Mexico upon such a charge. Of course, the record (fols. 30 to 166) contains in full the proceedings before the examining Judge in Mexico upon the charge made there "in the judicial in-

quiry in the crime of peculation attributed to ex-cashier of the Treasury, Mr. Mariano Viamonte Fernandez" (fol. 30). This proceeding was instituted by a petition of the prosecuting attorney (fol. 31), particularly at folio 35.

The crime charged is the crime of peculation. The extradition treaty between the United States of America and the United States of Mexico ratified March 8, 1899, provides for the extradition of persons "who shall have been charged with or convicted of any of the following crimes or offenses." Article 2, subdivision 13: "Embezzlement or criminal malversation of public funds committed within the jurisdiction of either party by public officers or depositories. 15. Embezzlement by any person or persons hired or salaried, to the detriment of their employers, when the crime is subject to punishment by the laws of the place where it was committed. 21. Extradition shall also be granted for the attempt to commit any of the crimes and offenses above enumerated, when such attempt is punishable as a felony by the laws of both contracting parties."

It is not necessary to argue to this Court that the crime of embezzlement by a public employee is well recognized in this country as a felony. It is true that the complaint speaks of the crime also as peculation, but this follows the language of the Mexican Penal Code. Article 1026 of the Federal Code of Penal Proceedings provides: "The crime of peculation is committed by every person who being in charge of a public service, even though it be on a commission for a limited time, and not having an official character, that for private uses, for himself or for others, fraudu-

lently detracts from its object, the money, values, properties or any other thing pertaining to the Nation, to a Municipality or to an individual, if by reason of his charge he should have received them to administer them, as a deposit, or for any other cause."

We think the complaint certainly alleges that appellant was "charged" with the commission of an extraditable offense. Any other result would be absurd, inasmuch as only in cases where the accused had been tried and convicted and thereafter became a fugitive from justice could the actual commission of the offense be properly alleged. Until his trial, all that the fugitive can ever be accused of is that he is believed to have committed a certain offense.

(2) The complaint describes the offense charged with all the necessary particularity.

1902. *Grin* v. *Shine*, 187 U. S. 181; 47 L. ed. 130. Appeal to review a judgment dismissing a writ of habeas corpus. Extradition proceedings under treaty with Russia on complaint of the Russian Consul in San Francisco charging embezzlement as employee.

Mr. Justice Brown:

> "In the construction and carrying out of such treaties (extradition treaties) the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused."

Regarding the form of complaint the court said:

> "Whatever might be the force of an objection to an indictment that it does not set out the exact language of the statute * * * we think it clear that the complaint in this particular is clearly sufficient. It is a general principle of criminal law that the complaint need not set forth the crime with the particularly of an indictment, and that, it is sufficient, if it fairly appraises the party of the crime of which he is charged."

To the same effect:—*Ex parte Zentner,* 188 F. 344 (D. C. Mass. 1910).

(3) In *Greene* v. *U. S.,* 154 Fed. 401 (C. C. A. 5th, 1907), *Shelby C. J.,* said:

> "It is not usual, nor would it be expedient or practicable, for the warrant of extradition to describe the crime with all the fullness that would be required in an indictment. * * * The same crime often has different names in different countries. If the act in question is criminal in both countries and is within the terms of the treaty, nothing more is required."

In *Ex parte Schorer,* 197 F. 67 (D. C. E. D. Wis. 1912) the court said:

> "The last claim made by the petitioner, that there is no evidence showing that the utterance of forged paper is a crime under the laws of Bavaria, is without merit. The record discloses sufficient of the Penal Code of Germany to show that the substance of the crime of uttering forged paper is the same in that country as here. I do not believe, however, that such question is the subject of inquiry before an extradition commissioner,

> unless required by treaty stipulation or act of Congress. The treaty specifies the extraditable crimes, and, when under section 5270 a complaint is lodged charging the commission of an offense covered by the treaty stipulation, the commissioner is not obliged to make extended inquiry as to the scope of the criminal jurisprudence of the demanding country. * * *"

In *Rice* v. *Ames*, 180 U. S. 371, 45 L. ed. 577, Mr. Justice Brown said:

> "We do not wish, however to be understood as holding that, in extradition proceedings, the complaint must be sworn to by persons having actual knowledge of the offense charged. This would defeat the whole object of the treaty as we are bound to assume that no foreign government possesses greater power than our own to order its citizens to go to another country to institute legal proceedings. This is obviously impossible."

It appears from the complaint that the United States Attorney made the same upon a request through diplomatic channel. It also appears from the motion to dismiss (fols. 15 and 16) that the appellant had been previously arrested in an extradition proceeding for the same offense in the same district and, therefore, the United States Attorney had ample sources of information from the previous proceeding.

There was no necessity for producing a formal request from the United States of Mexico for the surrender of the appellant. The production of such a document was entirely unnecessary.

Ex parte Zentner (*supra*):

> "The petitioner objects that no demand by the foreign government for his return has been shown prior to the institution of the proceedings before the commissioner. The commissioner ruled that no such demand need be shown. With this ruling I agree. No such prior demand is now held necessary to the validity of proceedings like these." (Citing, 127 U. S. 456, 460; 187 U. S. 181, 193-5).

See also—*Ex parte Schorer* (*supra*).

1887 *Benson* v. *McMahon*, 127 U. S. 458; 32 L. ed. 234. Appeal upon writ of habeas corpus in extradition. Crime of forgery in Mexico. There was no evidence in the record of any demand or requisition by the Mexican Government, but the court held this was not necessary.

There was, however, produced before the commissioner on this hearing a letter from the Attorney General of the United States transmitting to the United States Attorney for the District of New Hampshire a letter from the Mexican Charge d'Affaires to the Secretary of State asking that the papers be forwarded "without loss of time and through legal channels to the tribunal in charge of the case and that request be made to the Honorable, the Attorney, for the arrest of Senor Viamonte Fernandez" (fol. 25). This letter complies with all the requirements of a request, if one were necessary.

POINT III.

Since the enactment of Sec. 5270 (U. S. Comp. Stat. 1901, P. 3591), it is unnecessary to produce any copy of a warrant issued in the foreign country, but the record shows that a warrant for the arrest of appellant was issued and a properly authenticated copy thereof was offered in evidence before the commissioner.

The appellant further claims as an objection that no warrant had been issued for the arrest of the appellant within the United States of Mexico.

Not only is this allegation entirely incorrect, but it has been held that it is not necessary to produce before the commissioner any warrant or its equivalent.

Ex parte Schorer (*supra*):

> "It is not necessary to produce before the commissioner any warrant or equivalent of a warrant of any tribunal of the demanding country." * * * "The record in the present case discloses an authenticated copy of a document, signed by 'The Examining Magistrate of Royal Superior Court of Munich' * * * which, after description of the accused, recites the charge made against him, the provisions of the German Penal Code, his flight and probable guilt, and concludes with, 'the arrest of Schorer for the purpose of being placed under examination is ordered because the accused has fled.' This is sufficient. 'If not a warrant of arrest, it is an equivalent judicial document issued by a judge or magistrate authorized to do so.'"

In *Grin* v. *Shine* (*supra*):

The treaty (Russian) required the production of a copy of the warrant of arrest or of some other equivalent judicial document.

> "The clause is satisfied by the production of an equivalent document. * * * This order purports, not only to be signed but sealed by the examining magistrate and while it is not in the form of a warrant of arrest as used in this country, it is evidently designed to secure the apprehension of the accused, and his production before an examining magistrate. This seems to us a sufficient compliance with the treaty."

The court further held that Congress by Sec. 5270 (U. S. Comp. Stat. 1901, p. 3591) had waived the requirement of the production of a foreign warrant of arrest.

A duly authenticated copy of the proceedings before the examining magistrate in Mexico was produced and admitted in evidence. (Exhibit 3, folio 27). A portion of the documents constituting this Exhibit No. 3, is a decree ordering the arrest of Mariano Viamonte Fernandez (fols. 37 to 40). This document recites the institution of the proceeding and continues:

> "Therefore, there is reason to declare that the crime of peculation, the ground for the accusation, is duly proved by the elements that constitute it, in the terms that define it in Article 1026 of the Penal Code. * * * In view of what is stated and based on articles 16 of the General Constitution of the Republic and 103 of the Federal Code of Criminal Proceedings, referred to, let there be issued orders to the office of the Attorney General

of the Republic, so that, in its turn, it may order the Chief of the Federal Judicial Police to look for and arrest Mariano Viamonte, presumably guilty of the crime of peculation" (fol. 39).

Then follows a statement in folio 40:

"The order of arrest referred to in the preceding sentence was issued on the 22nd of May 1923."

As was said in *Ex parte Schorer*, if not a warrant of arrest, it is an equivalent judicial document issued by a judge or magistrate authorized to do so.

POINT IV.

The evidence produced before the commissioner was competent legal evidence amply sufficient to sustain the holding of the appellant for extradition.

It is not the function of the commissioner in an extradition matter to try the innocence or guilt of the party whose extradition is sought. He sits, at most, merely as a committing magistrate might sit to determine whether or not there is probable cause sufficient to hold the accused to answer more fully, in the appropriate tribunal, for the commission of an alleged crime. All that the committing magistrate needs to determine is that there has been a crime committed and that there is reasonable probability that the accused committed the crime.

District Judge Lowell, the commissioner here, had before him a very extensive record and found probable cause; after going into the matter on the merits upon the habeas corpus Judge Morris found probable cause, and both of these Judges had before them the record of the criminal proceedings in Mexico, under which the examining magistrate had found probable cause. Thus, we have three capable, experienced Judges, who have found evidence of probable cause.

We submit that no one can read this record without being impressed with Viamonte's guilt. The record shows indisputably a shortage of over 137,000 pesos in the cash of the Cashier's Department of the Department of Special Taxes. This was the finding of the First Supernumerary Judge in the Mexican proceedings (fol. 37); this was the finding of Jesus Icaza after eighteen days of auditing and inspection of the books of that Department kept in the handwriting of the appellant (fol. 50); this was the finding of the expert accountants, Luis C. Salazar and Juan Perez, appointed by the court to make a further investigation and check upon the audit of Jesus Icaza (fols. 60 and 61).

During the period that the losses occurred the appellant was cashier in sole charge of the handling of the money (fols. 159 to 164, and 168). He kept the books in his own handwriting. This is testified by Posada (fol. 168), by Aznar who was an employee under the appellant (fol. 162) and by Javier Robles (fol. 163). He had exclusive charge of the safe (fols. 160 to 164). He was heard asking people to make checks for payment of taxes to his personal order instead of

to the order of the Government. He gambled after hours and he fled from the country. All these facts can lead to but a single conclusion, that is, that as Cashier in a position of trust in public office, the appellant took this money and fled with it from the jurisdiction of his country.

1889. *Oteiza y Cortes* v. *Jacobus,* 136 U. S. 330; 34 L. ed. 464.

Appeal from order denying discharge on habeas corpus of appellant held for surrender to the Spanish authorities on extradition. The charge was embezzlement.

Mr. Justice Blatchford—

The embezzlement was of bonds belonging to the public debt. Appellant was an officer in charge of the public funds and moneys.

Speaking of the functions of the commissioner, the court said:

> "He is made the judge of the weight and effect of the evidence, and this court cannot review his action, when there was sufficient competent evidence before him to authorize him to decide the merits of the cause."

Benson v. *McMahon* (*supra*). On the subject of what proof was required the court (Mr. Justice Miller) said:

> "Taking this provision of the treaty, and that of the Revised Statutes above recited, we are of opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this

> country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused. * * *"

1912. *McNamara* v. *Henkel,* 226 U. S. 520; 57 L. ed. 330. Appeal in habeas corpus in extradition on charge of burglary committed in Canada. Mr. Justice Hughes:

> "The question simply is whether there was any competent evidence before the commissioner entitling him to act under the statute. The weight of the evidence was for his determination."
>
> "It is assigned as error that the commissioner received in evidence certain depositions. * * * We need not consider the sufficiency of this certificate, as the writ of habeas corpus does not operate as a writ of error, and mere errors are not the subject of review." 197 F. 67 at p. 72.

And in *Glucksman* v. *Henkel,* 221 U. S. 508, 55 L. ed. 830, Mr. Justice Holmes said:

> "It is common in extradition cases to attempt to bring to bear all the factitious niceties of a criminal trial at common law. But it is a waste of time. For, while, of course, a man is not to be sent from the country merely upon demand or surmise, yet if there is presented, even in somewhat untechnical form according to our ideas, such reasonable ground to suppose him guilty as to make it proper that he should be tried, good faith to the demanding government requires his surrender. We are bound by the existence of an extradition treaty to assume that the trial will be fair."

All the papers that were offered were properly authenticated in accordance with the provisions of the statutes of the United States and all the testimony was, as the certificate of the Charge d'Affaires of the United States, Mr. Summerlin, shows, such evidence as would be properly admissible in the Courts of Mexico, submitted in such a form as to make it properly admissible.

Such a certificate is proof of the fact (22 Stat. at L. 216, chap. 378, U. S. Comp. Stat. 1901, p. 3595).

> "That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States (Secs. 5270 and 5271, U. S. Comp. Stat. 1901, pp. 3591, 3593), such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so far as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant, or other paper, or copies thereof, so offered, are authenticated in the manner required by this act."

The sufficiency of such evidence to establish the criminality of the accused for the purposes of extradition cannot be reviewed upon *habeas corpus*. *Re Oteiza y Cortes*, 136 U. S. 330, sub nom. *Oteiza y Cortes* v. *Jacobus*, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031.

Grin v. *Shine* (*Supra*):

"The papers were, therefore, properly authenticated, and were admissible."

Mr. Justice Brandeis in *Collins* v. *Loisel*, 259 259 U. S. 309, 66 L. ed. 956.

It is further quite apparent that all the testimony is competent and admissible in the Mexican Courts because practically the entire record is a record of the proceedings in a Mexican Court.

An analysis of those facts appearing in the record as to the competency of which there can be no question, conclusively demonstrates that there were certain sums abstracted in cash, and that these abstractions were concealed by false virtual entries. It is not proof, as the appellant says "there may be somewhere a shortage," it is proof that in the cash received by this appellant as Cashier there is a shortage. It is true that nobody saw the appellant take the money, that nobody found any marked bills on him, but the money which was received by him, kept in his charge, placed in the safe over which he had sole control and for the transmittal of which he was under the law accountable, is missing. Certainly this is all that is necessary upon a committing hearing.

Icaza's report is competent first, as the testimony of an expert and secondly, because he is testifying directly from the books kept by the appellant in his own handwriting. It is not true that he used other figures in ascertaining the amounts of the shortages, as contended by the appellant. What he did use the petroleum reports and the diaries for was to check up upon

the facts which he had ascertained from the entries in appellant's own books. All that Icaza did to appellant's books in order to discover the shortages was to segregate the cash items from the virtual items, using exactly the same facts and figures that the appellant had himself written in his books. The sheets (fols. 74 to 132) are copies of the entries as made by the appellant (fol. 71) except that it is not clear whether the resumes attached to each month were made by Icaza, or were appellant's own resumes for the purpose of accounting each month to the comptroller and were the documents which were shown to Palencia. Then at folios 133 to 142 we have Icaza's act of the separation of these entries of Viamonte into entries of cash and entries virtual. Exactly the same figures were used. Let us take the month of May, 1922, the first month in which there were any peculations, we find the following: (fol. 91-92 and 115-116 and 133).

MAY, 1922.

Ingress		*Egress*	
Tobacco	272,706.34	Payments	810,905.73
Textiles	197,347.40		
Petroleum rents	5,925.50	Return of	
Commons in cash	25.00	deposits	
Mining	178,255.57	(Mining)	9,130.00
Surcharges	549.00		
Balances	7,318.53		
Premiums	1,951.48		
Petroleum	5,982,154.85		6,570,809.08
Deposits''	587,653.76		

The total of petroleum and deposits for guarantee of taxes (petroleum) on the Ingress side

is	$6,659,808.61
while on the egress side is	6,570,809.08
a difference of egress of	1,000.47
The total of all other receipts on the ingress side is	821,036.20
On the egress side the payments to treasury total	820,035.73
Again a difference of ingress of ...	1,000.47

If we take the month of December, 1922, we find the following:

Ingress

December, 1922.

	Entries Cash	*Entries Virtual*
Production stamps for tobacco trademarks	$212,041.32	
Production stamps for tobacco, loose	63,490.00	
Production stamps for tobacco, textiles	294,472.35	
Production stamps for tobacco, patents	5,350.00	
Production stamps for tobacco, Commons in cash.	1,250.00	$59,518.96
Mining tax, surcharges, etc.	29,487.11	
Production stamps for petroleum rents	1,778.75	
Deposits in guarantee of taxes	$70.00	$27,968.75
Petroleum		12,694,886.69
	$607,939.53	$12,782,374.40

EGRESS.

	Entries Cash	*Entries Virtual*
Payments to the Treasury in cash..	554,826.53	
Petroleum		12,756,471.16
Common stamps		59,518.96
Returned deposits titles mines	400.00	
Products stamps petroleum in cash		19,097.28
	$555,226.53	$12,835,087.40
SHORTAGE IN CASH..	$52,713.10	

It will be noted that these entries fully sustain our contention that in all cases of peculation the virtual entries on the egress side exceeded the ~~cash~~ entries on the ingress side and the cash entries on the ingress side exceeded the cash entries on the egress side by exactly the same amount. There is not a thing in the record to sustain the appellant's contention that Icaza made up these figures out of his head or by reference to any other documents. The diary entries and movement of petroleum and the items contained in folios 143 to 154 simply prove the facts ascertained by Icaza from the appellant's own books as one might prove an example in arithmatic by doing it another way. The appellant has raised certain questions based upon technical language, such as where Icaza said "he came to the conclusion," and it must be borne in mind that all these documents as they appear in the record are translations of Spanish originals and cannot, therefore, be viewed with the same techni-

cal certainty of language as if the reports and testimony had been taken in English. Icaza swears (fol. 71) that the amount of $137,387.61 is the amount which appellant took from the Cash Department of the Department of Special Taxes in varying amounts.

It is hardly necessary to say anything in regard to appellants' contention that the only charge against Viamonte is that he failed to collect some taxes which he should have collected. As a basis for this he relies upon Icaza's statement in his report that in addition to the amounts that he was able to ascertain from Viamonte's books there may be other amounts, and to a similar statement in the reports of Salazar and Perez. These statements are simply the ordinary precaution which any good accountant would take in making up an audit of improperly kept books. They found certain things and they saw the possibility that there might be other amounts that they were unable to find, but what Viamonte was charged with is the stealing of cash received by him and not any failure to collect some taxes which he should have received.

It is true, as appellant argues, that shortage of cash is not always presumptive evidence, either of larceny or of embezzlement. But when it is shortage of cash of a man occupying the position of cashier in a government office, who received the cash himself (fol. 168), who himself personally delivered the documents concerning petroleum to the comptrollership (fol. 48), who had direct control of the daily accounts of ingress and egress (fol. 48), who had exclusive charge

of the money pertaining to the Nation (fols. 159 to 164), who had exclusive charge of the safe in the cashier's office (fols. 159 to 164), who was solely responsible for the money existing in the safe (fols. 159 to 164), we submit that the shortage of that cash *is evidence of criminality.* We we add to that the fact that upon turning over his office he failed to deliver some of the documents (fol. 49) and that the auditor found, after the appellant had turned over his office, receipts to the amount of 548,-407.78 pesos, which had been retained by appellant (fol. 72) and a great number of declarations which had not been sent to the Stamp Department (fol. 73) that Viamonte had asked persons making payments to him to make the checks not in favor of the Treasury Department, but to his personal order (fols. 159 to 164), that his expenses had not been in proportion to the salary enjoyed by him as Cashier (fols. 159 to 164), that he had been accustomed to gamble at the ball-playing place, which is a Mexican gambling game; when we consider all these facts, we submit that there is every evidence of criminality of appellant.

All the papers that were offered were properly authenticated in accordance with the provisions of the statutes of the United States and all the testimony was, as the certificate of Charge d'Affaires of the United States, Mr. Summerlin, shows, which certificate is final on this point, such evidence as would be properly admissible in the Courts of Mexico, submitted in such a form as to make it properly admissible. It is further quite apparent that all the testimony

is competent and admissible in the Mexican Courts because practically the entire record is a record of the proceedings in a Mexican Court.

POINT V.

This being an appeal from a judgment in habeas corpus and not a writ of error, this court cannot pass upon the propriety of the rulings of the commissioner in the acceptance and rejection of evidence.

1921. *Collins* v. *Loisel*, 259 U. S. 309; 66 L. Ed. 956. Appeal after judgment refusing to discharge on *habeas corpus*, a person imprisoned under a warrant of commitment in foreign extraditional proceedings. Extradition at the request of British Consul. Crime of obtaining money by false pretenses.

Mr. Justice Brandeis:

> "It was not the function of the comitting magistrate to determine whether Collins was guilty, but merely whether there was incompetent legal evidence which • • • justify his apprehension and commitment for trial." • • • "If there was such evidence this court has no power to view his finding."

Collins was allowed to testify on the hearing before the commissioner but complained of the alleged improper exclusion of certain testimony. The court said:

> "The evidence excluded related strictly to the defense. It is clear that the mere

wrongful exclusion of specific pieces of evidence, however important, does not render the detention illegal. The function of the committing magistrate is to determine whether there is competent evidence to justify holding the accused to await trial. and not to determine whether the evidence is sufficient to justify a conviction."

"To have witnesses produced to contradict the testimony for the prosecution is obviously a very different thing from hearing witnesses for the purpose of explaining matters referred to by the government."

1912. *Charlton* v. *Kelly*, 229 U. S. 447; 57 L. ed. 1274. Appeal to review a judgment dismissing a writ of *habeas corpus*. Extradition of a fugitive from justice of the Kingdom of Italy.

The complaint charged the commission of murder in Italy.

Mr. Justice Lurton:

"A writ of *habeas corpus* cannot be used as a writ of error. If Judge Blair had jurisdiction of the person of the accused and of the subject matter, and had before him competent legal evidence of the commission of this crime with which the appellant was charged in the complaint, which according to the law of New Jersey, would justify his apprehension and commitment for trial if the crime had been committed in that state, his decision may not be reviewed on *habeas corpus*."

The appellant contended that at the hearing before the commissioner evidence of insanity was offered and excluded.

"It is now said that this ruling was erroneous. But if so, this is not a writ of

error, and mere errors in the rejection of evidence are not subject to review by a writ of *habeas corpus.*" * * * "We therefore conclude that the examining magistrate did not exceed his authority in excluding evidence of insanity. * * * A defendant has no general right to have evidence exonerating him go before a grand jury * * * ."

1921. *Collins* v. *Loisel* (*supra*).

Here the United States Consul General in Calcutta had certified that certain papers were "properly and legally authenticated so as to entitle them to be received in evidence for similar purposes by the tribunals of British India, as required by the Act of Congress of August 3, 1882."

"Sec. 6 of the Act of 1882 expressly provides for the repeal of so much of Sec. 5271 as is inconsistent with earlier provisions of that act;"

"Another argument of Collins is that the Indian documents were not properly authenticated because they were certified to by the Consul General at Calcutta, and not by the Consul at Bombay, where the offense charged is alleged to have been committed. The 'foreign country' here in question is India, not Bombay, and we may, in this connection, take judicial notice of the fact that the Consul General of the United States, who is stationed at Calcutta, is the principal diplomatic or consular officer resident in that country, and who he is. The papers were, therefore, properly authenticated and were admissible."

Elias v. *Ramirez* (*supra*).

"It is further contended that the statements of Rosas and Enriquiz were unsworn

to, and because unsworn to were not admissible in evidence; that 'under the common law and the law of Arizona the unsworn statement of no witness is competent upon a preliminary hearing before a committing magistrate,' and would not justify a commitment for trial in Arizona. * * * The answer to the contention is that the statute providing for extradition makes the deposition receivable in evidence, and provides that their sufficiency to establish the crime shall be such as to create a probability of the commission by the accused of the crime charged against him."

1870. *re Farez*, 8 Fed. Cas. No. 4645; 7 Blatch 345.

A writ of *habeas corpus* and writ of certiorari in extradition on application of Swiss authorities.

"The theory on which treaties for extradition are made is, that the place where a crime was committed is the proper place in which to try the person charged with having committed it; and nothing is required to warrant extradition, except that sufficient evidence of the fact of the commission of the crime shall be produced, to justify a commitment for trial for the crime. In acting under the 33rd section of the judiciary Act of 1789, in regard to offenses against the United States, a committing magistrate acts on the principle, that, in substance, after an examination into the matter and a proper opportunity for the giving of testimony on both sides, there is reasonable ground to hold the accused for trial."

1873. *re MacDonnell*—16 Fed. Cas. No. 8772; 11 Blatch 170.

Habeas corpus in extradition. After extensive examination of authorities WOODRUFF, *C. J.* said:

> "It was held, and held successively for many years that, if it appears to the judge or to the court issuing the writs, that the commissioner had acquired jurisdiction, by a conformity of the proceeding to the requirements of the treaty and the acts of Congress, and that he had not exceeded his jurisdiction, that was the end of the inquiry; that, whether the evidence received by him was sufficient or insufficient, was a question to be determined by him; * * * In no view of the subject, therefore, should we be called upon to discharge the prisoner, upon the idea that the evidence was not sufficient. No case has yet gone so far as to say, that becaue some evidence was introduced which was not legal or competent, or because the court, upon a review of the evidence, was of opinion that it would have come to a different conclusion upon the evidence, therefore, the proceedings were illegal and the prisoner must be discharged."

In *Glucksman* v. *Henkel*, 221 U. S. 508, 55 L. ed. 830, the court said that nothing in the cases

> "indicates that because the law of New York in this case may determine whether the prisoner is charged with an extraditable crime, it is to determine the effect of such variance between evidence and complaint. That is a matter to be decided on general principles irrespective of the law of the State."

In *Collins* v. *Loisel*, *supra*, the court said:

> "The phrase 'such evidence of criminality,' as used in the treaty, refers to the

> scope of the evidence, or its sufficiency to block out those elements essential to a conviction; it does not refer to the character of specific instruments of evidence, or to the rules governing admissibility * * * and whether there is a variance between the evidence and the complaint is to be decided by the general law and not by that of the State."

The appellant has argued in the draft of his brief, which is so far all that we have been aided by, that there is no finding by the magistrate of the commission of an extraditable crime by the appellant or, as expressed further on in the brief, the commissioner has not found that there is probable cause to believe that Fernandez is guilty of an extraditable offense. We cannot understand such an argument and cannot believe it is seriously advanced. The Mexican Court found (fol. 39) "there is reason to declare that the crime of peculation, the ground for the accusation, is duly proved by the elements that constitute it, in the terms that define it in article 1026 of the Penal Code." The charge upon which this finding was made was the specific charge of the peculation of the specific sum of 137,387.61 pesos, oro nacional, between the specific dates mentioned in the complaint herein. Judge Lowell found after a full hearing and consideration of the matter "it appearing to me that said offense had been committed and probable cause being shown to believe said defendant committed said offense as charged" (fol. 9). Judge Morris in the *habeas corpus* proceeding said (fol. 173) "Now determining the case upon its merits, I am of

the opinion there was sufficient evidence adduced before Judge Lowell to warrant holding the relator in custody to await action on extradition." We cannot imagine how the Judges before whom the matter has come could have more definitely found probable cause of the commission by the appellant of an extraditable crime.

CONCLUSION.

The judgment denying the Writ of Habeas Corpus should be affirmed and the appellant remanded to the custody of the appellee to await the order of the proper authorities.

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